MOTION FILED

FEB 8 2002

No. 01-908

IN THE

Supreme Court of the United States

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

v.

CHARLES ROBINSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE UNITED STATES CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20026
(202) 463-5337

ZACHARY D. FASMAN*
NEAL D. MOLLEN
PATRICK W. SHEA
CARLA R. WALWORTH
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000

Attorneys for Amicus Curiae

* *Counsel of Record*

172240

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

31 pp

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States (the Chamber) moves for leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Second Circuit. A copy of the proposed brief is attached. The Chamber is filing this Motion because Respondents have refused to consent to the filing of this brief. In further support of this Motion, the Chamber notes the following.

1. The Chamber is the world's largest federation of business companies and associations, with an underlying membership of nearly 3,000,000 businesses and professional organizations of every size, in every industry sector, and every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to American business.

2. One continuing concern of the American business community has been the proper interpretation and application of the employment discrimination laws in general, and the conduct of employment discrimination litigation in particular. The Chamber of Commerce, with the consent of the parties or the Court, has filed amicus curiae briefs in the Court in numerous recent employment discrimination cases, including *Toyota v. Williams*, 122 S. Ct. 681 (2002); *Circuit City Stores v. Adams*, 532 U.S. 105 (2001); *Reeves v. Sanderson Plumbing Products, Inc.*, 531 U.S. 133 (2000); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

3. The decision below creates and deepens significant and mature circuit splits of authority in an area of particular concern to the Chamber and its members; class action employment discrimination litigation. The Second Circuit, in contrast to decisions in other circuits, has ordered that class actions seeking money damages be certified under Fed. R. Civ. Pro. 23(b)(2) if the named class representatives aver that they are most interested in injunctive and declaratory relief, regardless of whether such relief in fact predominates over the money damages sought, and regardless of the difficulty of trying of a class action comprised of hundreds of individual claims for damages; has authorized the use of opt out notices in such cases, a course of action normally reserved for class actions certified under Rule 23(b)(3); and has precluded lower courts from conducting any meaningful analysis of evidence proferred by class representatives at the certification stage, claiming that such analysis is forbidden by the Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

4. In combination, the rulings below render the class certification process little more than a formality. They also reflect the disarray in which the lower courts find themselves on the most fundamental questions posed by Rule 23 in class action employment litigation. These problems are exacerbated by the changes wrought by the Civil Rights Act of 1991, which at once made employment discrimination class actions more numerous, the applicable law more complex, and the application of the Court's prior decisions less clear.

5. The Chamber believes that the instant case, as well as *Thiessen v. GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001), in which a writ of certiorari also is being sought with the Chamber's support, present exceptionally significant issues in this area with great

clarity. The Chamber submits that its views on these issues would be useful to the Court in determining whether to grant the Petition, and in deciding the issues posed in the event that review is granted.

Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the attached brief.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20026
(202) 463-5337

ZACHARY D. FASMAN*
NEAL D. MOLLEN
PATRICK W. SHEA
CARLA R. WALWORTH
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000

Attorneys for Amicus Curiae

* *Counsel of Record*

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Interest of the Amici	1
Summary of Argument	1
Statement	5
Reasons for Granting the Writ	8
I. The Court Should Clarify The Applicability Of Rule 23(b) To Employment Discrimination Class Actions Seeking Money Damages.	8
A. The Court Should Clarify The Standard for Certification Under Rule 23(b)(2).	8
B. The Court Should Clarify Whether A Bifurcated Proof Scheme Remains Viable In Class Actions Seeking Damages.	12
II. The Court Should Resolve Whether A Court May Engage In Meaningful Analysis Of Facts Proferred By Plaintiffs At The Class Certification Stage.	17
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

Adams v. Henderson,
197 F.R.D. 162 (D. Md. 2000) 9

Allison v. Citgo Petroleum Corp.,
151 F.3d 402 (5th Cir. 1998) .. 3, 4, 6, 7, 9, 10, 12, 14

Amchem Products Inc. v. Windsor,
521 U.S. 591 (1997) 17

Ardrey v. United Parcel Service,
798 F.2d 679 (4th Cir. 1986) 15, 16

Blyden v. Mancusi,
186 F.3d 252 (2d Cir. 1999) 14

Burrell v. Crown Central Petroleum, Inc.,
197 F.R.D. 284 (E.D. Tex. 2000) 9

Caridad v. Metropolitan-North R.R.,
191 F.3d 283 (2d Cir. 1999) 18

Castano v. American Tobacco Co.,
84 F.3d 734 (5th Cir. 1996) 14

Coates v. Johnson & Johnson,
756 F.2d 524 (7th Cir. 1985) 16

Coopers & Lybrand v. Livesay,
437 U.S. 463 (1978) 19

County of Suffolk v. Long Island Lighting Co.,
907 F.2d 1295 (2d Cir. 1990) 11

Cited Authorities

Page

Crown, Cork & Seal Co. v. Parker,
462 U.S. 345 (1983) 2, 16

Deposit Guaranty National Bank v. Roper,
445 U.S. 326 (1980) 17

Doninger v. Pacific Northwest Bell, Inc.,
564 F.2d 1304 (9th Cir. 1977) 17

East Texas Motor Freight Systems, Inc. v. Rodriguez,
431 U.S. 395 (1977) 2

Eisen v. Carlisle & Jacquelin,
391 F.2d 555 (2d Cir. 1968),
vacated on other grounds 6

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 18

Eubanks v. Billington,
110 F.3d 87 (D.C. Cir. 1997) 11

Feinstein v. Firestone Tire & Rubber Co.,
535 F. Supp. 595 (S.D.N.Y. 1982) 17

General Telephone Co. v. Falcon,
457 U.S. 147 (1982) 2, 17, 18

Hardin v. Caterpillar, Inc.,
227 F.3d 268 (5th Cir. 2000) 14

Holmes v. Continental Can Co.,
706 F.2d 1144 (11th Cir. 1983) 11

Cited Authorities

Page

International Brotherhood of Teamsters v. United States,
431 U.S. 324 (1977) 12, 13, 15

Jefferson v. Ingersoll International Inc.,
195 F.3d 894 (7th Cir. 1999) 7, 9, 10

Johnston v. HBO Film Management, Inc.,
265 F.3d 178 (3d Cir. 2001) 4, 17

Lemon v. International Union of Operating Eng'rs Local 139,
216 F.3d 577 (7th Cir. 2000) 6, 7, 9

Lienhart v. Dryvit System, Inc.,
255 F.3d 138 (4th Cir. 2001) 17

Lockart v. Westinghouse Credit Corp.,
879 F.2d 43 (3rd Cir. 1989) 13

Love v. Turlington,
733 F.2d 1562 (11th Cir. 1984) 20

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 13

Metropolitan-North R.R. v. Norris,
529 U.S. 1107 (2000) 6

Miller v. Hygrade Food Products,
198 F.R.D. 638 (E.D. Pa. 2001) 9

Ortiz v. Fibreboard Corp.,
527 U.S. 815 (1999) 11

Cited Authorities

Page

Reece v. Georgia, 350 U.S. 85 (1955) 18

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir.), *cert. denied*,
516 U.S. 867 (1995) 13

Rutstein v. Avis Rent-A-Car Systems, Inc.,
211 F.3d 1228 (11th Cir. 2000), *cert. denied*
sub nom Zerei Agudath Israel Bookstore v.
Avis Rent-A-Car System, Inc.,
121 S. Ct. 1354 (2001) 7, 9, 12

Scott v. United States,
436 U.S. 128 (1978) 18

Smith v. Texaco, Inc.,
263 F.3d 394 (5th Cir. 2001) 4, 12, 14

Stastny v. Southern Bell Telegraph & Telegraph Co.,
628 F.2d 267 (4th Cir. 1980) 17, 19, 20

Szabo v. Bridegport Machines, Inc.,
249 F.3d 672 (7th Cir.), *cert. denied*,
122 S.Ct. 348 (2001) 4, 20

Thiessen v. GE Capital Corp.,
255 F.3d 1221 (10th Cir. 2001),
pet. for cert. filed, 70 U.S.L.W. 3410 (2001) ... 4, 12, 18

Ticor Title Insurance Co. v. Brown,
511 U.S. 117 (1994) 3, 11

United States Parole Commission v. Geraghty,
445 U.S. 388 (1980) 17

Cited Authorities

Page

Washington v. Washington State Passenger Fishing Vessel Association, 443 U.S. 658 (1979) 18

Western Electric Co. v. Stern, 544 F.2d 1196 (3d Cir. 1976) 16

Rules:

Fed. R. Civ. P. 23 ..... *passim*

Fed. R. Civ. P. 23(a) 6, 18

Fed. R. Civ. P. 23(b) 6, 8

Fed. R. Civ. P. 23(b)(2) ..... *passim*

Fed. R. Civ. P. 23(b)(3) 2, 6, 7, 11

Secondary Sources:

Judicial Business of the United States: 2000 Report of the Director, Table X-4 1

Judicial Business of the United States Courts: 2000 Annual Report of the Director, Table C-2 1

Fentonmiller, *Damages, Jury Trials and the Class Action under the Civil Rights Act of 1991*, 12 Lab. Law. 421 (1997) 15

Cited Authorities

Page

Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23 Certification of Across-the-Board Employment Discrimination Cases*, 5 Lab. Law. 415 (Winter/Spring 2000) 2, 3, 12

DOJ SPEC. REP., *Civil Rights Complaints in U.S. District Courts* 1990-1998 (January 2000) 1

Court Approves $192.5 Million Settlement In Race Bias Class Action Against *Coca-Cola*, Daily Labor Report (BNA) No. 127 (July 3, 2001) 2

Texaco Corp. Agrees To Spend $176 Million to Settle Race Bias Suit, Daily Labor Report (BNA) No. 222 (Nov. 18, 1996) 2

Judge Gives Final Approval to Settlement under which Publix will pay $81.5 million, Daily Labor Report (BNA) No. 102 (May 28, 1997) 2

Federal Court Certifies Boeing Class; Female Employees Allege Job Disparities, Daily Labor Report (BNA) No. 204 (Oct. 24, 2001) 4

Federal Judge Certifies Class Action In Black Worker's Suit Against Publix, Daily Labor Report (BNA) No. 57 (Mar. 25, 1999) 4

INTEREST OF THE AMICI

The Chamber of Commerce of the United States (the Chamber) is identified in the preceding Motion for Leave to File.[1] Its interest in this matter is more completely expressed in the preceding Motion for Leave to File and in the Summary of Argument section below, and thus will not be restated at further length in this section.

SUMMARY OF ARGUMENT

1. Since 1991, when Congress authorized the recovery of compensatory and punitive damages and provided for jury trials under Title VII of the Civil Rights Act, the number of employment discrimination cases filed in the federal courts has nearly tripled,[2] an increase matched by the number of employment discrimination class actions filed annually in the federal courts.[3] There currently are 170 employment discrimination class actions pending in the federal courts, affecting the lives and livelihoods of tens of thousands of American workers and their employers.[4] Many other employment discrimination class actions are no longer pending because they recently have been resolved through widely

---

1. Pursuant to Sup. Ct. Rule 37.6, the Chamber asserts that neither Petitioner nor Respondents assisted the Chamber or its counsel, in any way (even with expenses), in preparing or submitting this brief.

2. 8,413 civil rights employment cases were filed in the federal courts in 1990; in 1998 23,375 such cases were filed. *See* DOJ SPEC. REP., *Civil Rights Complaints in U.S. District Courts 1990-1998*, (January, 2000), at 1-2 (concluding that "[t]he growth of civil rights cases has been due largely to the increase in employment cases between private parties."). *See also Judicial Business of the United States Courts: 2000 Annual Report of the Director*, at Table C-2 (reporting that 21,928 employment cases were filed in 2000).

3. *See 1999 Federal Court Class Action Statistics*, Class Action Reports, Table 6, (employment class actions rose from a low of 30 filed in 1992 to 85 filed in 1998).

4. *See Judicial Business of the United States: 2000 Report of the Director*, at Table X-4.

reported multi-million dollar settlements, setting the stage for additional class action litigation.[5]

2. In decisions rendered twenty years ago, the Court provided careful and specific guidance for applying the requirements of Rule 23 to employment discrimination class litigation, making clear that the lower courts cannot certify a class action absent a "rigorous analysis" to ensure that appropriate procedural requirements have been met.[6] Despite the profusion of new class litigation, the Court has not opined upon how the expansion of relief, and the availability of jury trials, affects the use of the class action procedure in employment discrimination cases.

3. Without the Court's guidance, confusion has reigned as courts have struggled to harmonize the new rights created by the 1991 Act with the "principal purposes" of Rule 23: to promote "efficiency and economy of litigation. . . . ." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). Despite significant questions about the use of a single class action to adjudicate myriad claims for compensatory and punitive damages, some courts have certified broad classes under both Rule 23(b)(2) and 23(b)(3), rendering orders which, as the Advisory Committee on the Federal Rules recently observed, can "force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."[7]

---

5. *See generally Court Approves $192.5 Million Settlement In Race Bias Class Action Against Coca-Cola*, Daily Labor Report (BNA) No. 127, at 1-5 (July 3, 2001); *Texaco Corp. Agrees To Spend $176 Million to Settle Race Bias Suit*, Daily Labor Report (BNA) No. 222, at D-4 (Nov. 18, 1996); *Judge Gives Final Approval to Settlement under which Publix will pay $81.5 million*, Daily Labor Report (BNA) No. 102, at D-26 (May 28, 1997).

6. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982); *and see East Texas Motor Freight Systems, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

7. Notes of Advisory Committee on 1998 Amendments. *See also* Gary M. Kramer, *No Class: Post-1991 Barriers to Rule 23*

(Cont'd)

4. The decision below represents the furthest extreme of this pro-certification approach. Rejecting settled law elsewhere, the Second Circuit held that a class action seeking compensatory damages must be certified under Rule 23(b)(2) if the district court concludes, on the basis of an "ad hoc balancing" test, that monetary relief is not foremost in the minds of the plaintiffs based upon, *inter alia*, the court's subjective judgment whether "even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive and declaratory relief sought." Recognizing that certification of class claims for money damages under Rule 23(b)(2) "poses a due process risk because this provision does not expressly afford the procedural protections of notice and opt out", the court below held that notice and opt out rights are available and should be afforded under Rule 23(b)(2), ignoring the Court's observation to the contrary.[8] And, in line with decisions in several sister circuits, the court below held that in assessing whether the named plaintiffs have demonstrated sufficient commonality and typicality to satisfy the requirements of Rule 23(a), any meaningful analysis of the evidence proferred by the class constitutes an improper inquiry into the merits of the sort forbidden by the Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), guaranteeing that mere allegations made by class plaintiffs suffice to warrant certification.

5. This "certification-at-all-costs" approach to employment class litigation[9] cannot be reconciled with the Court's decision in *Falcon*. Moreover, as the court below acknowledged, its ruling

---

(Cont'd)

Certification of Across-the-Board Employment Discrimination Cases, 15 Lab. Law. 415, 417 (Winter/Spring 2000).

8. *See generally Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 121 (1994) (dismissing writ of certiorari as improvidently granted).

9. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998).

is flatly at odds with well-established law in other circuits, which have refused to allow class certification under Rule 23(b)(2) unless the monetary relief is incidental to the injunctive relief sought and in which a more searching factual inquiry under Rule 23 is routinely allowed.[10] Ironically, to avoid application of this more restrictive line of decisions, named class plaintiffs frequently have jettisoned claims for compensatory or punitive damages and trial by jury[11], making significant strategic decisions that may bind and disadvantage absent class members.

6. Neither class members seeking relief nor employers facing enormous liability and huge legal fees for defense are served by such dramatic uncertainty in the law. Respectfully, the Chamber submits that guidance by the Court on the impact of expanded remedies and trial by jury upon employment discrimination class actions is desperately required. For reasons more fully developed below and elsewhere, the instant case and *Thiessen v. GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001), in which a writ of certiorari also is being sought with the support of the Chamber,

---

10. *See generally Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422 (5th Cir. 1998); *and see Smith v. Texaco, Inc.* 263 F.3d 394 (5th Cir. 2001), *opinion withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Szabo v. Bridegport Machines, Inc.*, 249 F.3d 672, 677-78 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001) ("The proposition that a district judge must accept all of the complaint's allegations when deciding whether to certify a class cannot be found in Rule 23 and has nothing to recommend it."); *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 194 (3d. Cir. 2001).

11. *Federal Court Certifies Boeing Class; Female Employees Allege Job Disparities*, Daily Labor Report (BNA) No. 204, at A-2 (Oct. 24, 2001). *See* 2001 BNA Daily Labor Report No. 204 (Daily Ed. October 24, 2001) at A-2 (attorney for class of Boeing employees noting that the class had not requested compensatory damages to minimize certification problems); *Federal Judge Certifies Class Action In Black Worker's Suit Against Publix*, Daily Labor Report (BNA) No. 57, at A-3 (Mar. 25, 1999) (class counsel in suit against Publix commenting on decision to forego damages, withdraw jury demand and strike employer's jury demand).

are ideal vehicles for addressing these very significant issues and bringing necessary clarity to this field.

STATEMENT

1. Petitioner is a commuter railroad serving New York City and its northern suburbs. Respondents claim to represent a class of all African-American employees of Petitioner from 1983 to 1996, approximately 1,300 individuals. Pet. App. A-79.

2. Respondents do not challenge a centralized rule or policy of discrimination, and have conceded that Petitioner's standardized company policies and procedures are non-discriminatory. Pet. App. A-82. Rather, Respondents challenge Petitioner's alleged practice of "overdelegating" discretionary authority to make employment decisions related to discipline and promotions to department supervisors, which Respondents maintain has been used by individual managers to discriminate against African-American employees. Respondents have advanced both disparate treatment and disparate impact theories of recovery, and seek money damages on behalf of class members to redress, *inter alia*, "serious and permanent emotional distress due to degradation, denigration, harassment and humiliation."[12]

3(a). In two successive opinions, the district court found that this putative class action could not meet the requirements of Rule 23. In its initial ruling, the district court credited Petitioner's criticism of the statistical evidence presented by Respondents and found that "even taken most favorably to [Respondents]", their statistics did not establish a pattern of discriminatory decision-making because the statistics were global in nature and failed "to take account of the fact that different Metro-North positions have different individual rates of discipline and promotion associated with them." Pet. App. A-81. The court also found that the anecdotal evidence presented by several of the named plaintiffs, taken at face value, was statistically insufficient to satisfy the commonality and

12. Punitive damages are not available against Petitioner because it is a public entity. Pet. App. A-68.

typicality requirements for the very large class sought to be represented. Pet. App. A-82.

(b) A split panel of the Second Circuit found an abuse of discretion and reversed,[13] the majority holding that "in deciding a certification motion, district courts must not consider or resolve the merits of the claims of the purported class", Pet. App. A-57, and concluding that the district court improperly had relied upon Petitioner's criticism of the report of Respondents' statistical expert. The majority found that although Petitioner's statistical critique "might prove fatal at the merits stage . . . this sort of 'statistical dueling' is not relevant to the certification decision." Pet. App. A-55. Concluding that Respondents had submitted sufficient proof to establish compliance with Rule 23(a), the majority remanded so that the district court could consider the application of Rule 23(b) to the case.[14]

4(a). On remand, the district court held that even if Rule 23(a) requirements were met, certification was not appropriate under either Rule 23(b)(2) or (b)(3). Noting that Rule 23(b)(2) " 'was never intended to cover cases . . . where the primary claim is for damages, but is only applicable where the relief sought is exclusively or predominantly injunctive or declaratory'", Pet. App. A-69,[15] the District Court adopted the "incidental damages" approach enunciated by the Fifth Circuit in *Allison v. Citgo Petroleum Corp.*, and followed in other circuits.[16] The court thus found that certification of a class action

13. *Caridad v. Metro-North Commuter R.R.*, reported at 191 F.3d 283 (2d Cir. 1999), reprinted at Pet. App. A-39-66.

14. Judge Walker dissented, concluding that the alleged policy of delegating personnel decisions to first line supervisors did not constitute a policy or practice "sufficient to satisfy the commonality requirement of Rule 23(a)." Pet. App. A-64. Metro-North's petition for a writ of certiorari was denied. 529 U.S. 1107 (2000).

15. Quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564 (2d Cir. 1968), *vacated on other grounds*, 417 U.S. 156 (1974).

16. *Allison v. Citgo Petroleum, Inc.*, 151 F.3d 402 (5th Cir. 1998); *see also Lemon v. International Union of Operating Eng'rs Local 139*, (Cont'd)

seeking both monetary damages and injunctive relief was appropriate under Rule 23(b)(2) only where the "damages flow directly from liability to the class as a whole on the claims forming the basis of the injunctive and declaratory relief . . . [and are] capable of computation by means of objective standards and not dependent in any significant way upon the intangible subjective differences of each class member's circumstances." Pet. App. A-70 (quoting *Allison*). The court found that in this case,

> determination of the damages suffered by individual member of the class would require individualized proof and proceedings to determine whether each such member suffered intentional discrimination on the part of his or her department manager, what injuries each such member thereby suffered, what individualized damages were appropriate to redress such injuries, etc. . . . [B]y any reasonable standard, and on any reasonable view of this case, these multiple individual determinations for the numerous members of the class here proposed would overwhelm classwide injunctive issues. . . .

Pet. App. A-71. The court refused to certify under Rule 23(b)(3) because "questions of fact affecting individual members of the class . . . vastly predominate over any common questions of law or fact" and concluded that given the highly individualized, fact-specific determinations required to determine both liability to and damages for individual class members, "the class action approach, far from being more efficient than individual actions, would be hopelessly complicated and prolonged." Pet. App. A-73.

(Cont'd)

216 F.3d 577 (7th Cir. 2000); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied sub nom Zerei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 121 S. Ct. 1354 (2001); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999).

(b). Once again the Second Circuit found that the district court abused its discretion. Acknowledging but rejecting the "incidental damages" rule applied in other circuits, the court below held that district courts in the Second Circuit are required to conduct "an ad hoc balancing that will vary from case to case", Pet. App. A-23, which at a minimum requires a finding that "even in the absence of possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive and declaratory relief sought." *Id.* Noting the "due process risk" looming in any mandatory class action for money damages, the court of appeals advised the district court to "afford[] notice and opt out rights to absent class members for those portions of the proceedings where the presumption of class cohesion falters — *i.e.*, the damages phase of the litigation." Pet. App. A-27. The Second Circuit remanded the case to the district court to reconsider certification of the entire case under Rule 23(b)(2) as interpreted, but specifically ordered the lower court to "bifurcate the pattern-or-practice claim and certify the liability stage under Rule 23(b)(2)", Pet. App. A-38, in the event that it chose not to certify the entire case, rejecting Petitioner's argument that bifurcated trial of the liability determinations before successive juries was incompatible with the Seventh Amendment. Pet. App. A-32. A timely petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. The Court Should Clarify The Applicability Of Rule 23(b) To Employment Discrimination Class Actions Seeking Money Damages.

A. The Court Should Clarify The Standard for Certification Under Rule 23(b)(2).

A class action can be certified under Rule 23(b)(2) so long as "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The Advisory Committee Notes to the Rule explain that Rule 23(b)(2)

incorporates an inherent proportionality inquiry: "The subdivision does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." *Id.* (emphasis added). The task posed by a given case, then, is to locate the remedial center of gravity; if trial of the case will revolve primarily around individualized claims for damages, certification under Rule 23(b)(2) is inappropriate.

Most courts of appeal have held that in employment discrimination class actions, this issue ought to be determined by application of an objective test based upon the relationship between the types of relief sought; "monetary relief predominates in (b)(2) class actions unless it is incidental to requested injunctive or declaratory relief." *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 422-25.[17] Money damages are "incidental" if (1) they "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief"; (2) they are damages to which a class member *automatically* would be entitled once classwide liability is established; and (3) they are capable of computation by objective standards and "not dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Id.* (emphasis added).[18]

This test has much to recommend it. It is consistent with the basic assumption underlying Rule 23(b)(2): the class has suffered an indivisible harm and seeks to vindicate a largely indivisible right. As Judge Easterbrook has explained,

---

17. *See also Lemon v. International Union of Operating Eng'rs Local 139*, 216 F.3d 577 (7th Cir. 2000); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied sub nom Zerei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 121 S. Ct. 1354 (2001); *Jefferson v. Ingersoll Int'l*, 195 F.3d 894 (7th Cir. 1999).

18. *Accord Rutstein*, 211 F.3d 1228 (11th Cir. 2000); *Lemon*, 216 F.3d 577 (7th Cir. 2000); *Miller v. Hygrade Food Products*, 198 F.R.D. 638, 641-42 (E.D. Pa. 2001); *Burrell v. Crown Cent. Petroleum, Inc.*, 197 F.R.D. 284, 289 (E.D. Tex. 2000); *Adams v. Henderson*, 197 F.R.D. 162, 171 (D. Md. 2000).

"Rule 23(b)(2) is designed for all-or-none cases in which 'final relief of an injunctive nature or a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate.'" *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897-98 (7th Cir. 1999). "[C]ompensatory and punitive damages," conversely, "require individualized proof and determinations" and thus generally would not be "incidental" to equitable relief. *Allison*, 151 F.3d at 418.

The decision below, rejecting *sub silentio* a specific finding by the district court that "multiple individual determinations for the numerous members of the class here proposed would overwhelm classwide injunctive issues", Pet. App. A-73, takes the opposite approach by endorsing a wholly subjective test based upon the presumed desires of the class plaintiffs. The Second Circuit admittedly "decline[d] to adopt the incidental damages approach set out by the Fifth Circuit in *Allison* and followed by the district court below," (and, as shown above, by other courts of appeals). Pet. App. A-23. Its "ad hoc balancing" test, based on "the relative importance of the remedies sought . . . , the positive weight or value [to the plaintiffs] of the injunctive or declaratory relief sought. . . ." Pet. App. A-23 (bracketed text in original) has little to recommend it as a means to determine where the remedial center of gravity lies in a case.

The idiosyncratic "test" chosen by the court of appeals for determining the suitability of certification under Rule 23(b)(2) is, in reality, no test at all. In every instance, putative plaintiffs seeking class certification will submit affidavits asserting that the injunctive or declaratory relief they seek is foremost in importance to them. By focussing on the class plaintiffs' subjective "interests" rather than the cohesion of the class or the relationship between the claimed relief and the investment of judicial resources needed to determine whether that relief is warranted, the rule adopted below makes Rule 23(b)(2) certification all but automatic in employment discrimination class actions. Adoption of this test raises the question identified

but left unanswered in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994), *viz*, whether an action for damages can be certified under Rule 23(b)(2). While the *Ticor* Court expressed skepticism that such a certification would *ever* be possible,[19] the Second Circuit's opinion suggests that such a certification is all but unavoidable.

Granting the Petition also would allow the Court to address a significant question posed by the decision below; whether notice and an opportunity to opt out is permissible under Rule 23(b)(2). The proposition that notice and opt out rights are available in Rule 23(b)(2) actions, a course also suggested by other circuits,[20] cannot be squared with the text of the Rule or the Court's opinions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Ticor*. As the Court observed in *Ortiz*, subdivisions (b)(1) and (b)(2) "provide[] for certification of a class whose members *have no right to withdraw*. . . ." 527 U.S., at 817. *See also Ticor*, 511 U.S. at 121 ("Rule 23(b)(3) permits optout . . . Rules 23(b)(1) and (b)(2) . . . do not."). The decision below rewrites Rule 23, creating a new hybrid class action in which damage claims which do not satisfy the requirements of Rule 23(b)(3) may be litigated (complete with opt out notices) under Rule 23(b)(2), a wholly inappropriate state of affairs.

The "objective" and "subjective" approaches to class certification adopted by the circuits cannot co-exist. The rights of employers and employees alike in these enormous and highly significant cases should not vary from circuit to circuit. If the decision below is allowed to stand, plaintiffs will simply bring nationwide employment discrimination class actions in the Second Circuit, which alone has held that they may (indeed must) routinely be certified under Rule 23(b)(2). The Chamber

---

19. *Ticor*, 511 U.S. at 121 (there "is at least a substantial possibility" that a class action seeking money damages only can be certified under Rule 23(b)(3)).

20. *See also Eubanks v. Billington*, 110 F.3d 87 (D.C. Cir. 1997); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295 (2d Cir. 1990); *Holmes v. Continental Can Co.*, 706 F.2d 1144 (11th Cir. 1983).

respectfully suggests that the Court should grant the Petition and resolve a circuit split that affects the lives and livelihoods of thousands of individuals and their employers.

B. The Court Should Clarify Whether A Bifurcated Proof Scheme Remains Viable In Class Actions Seeking Damages.

The court below held that the district court abused its discretion by refusing to bifurcate the case and certify the "liability" portion of the case under (b)(2), leaving the class members to litigate their entitlement to individual relief before subsequent juries. Pet. App. A-32, and n.13. In essence, the court below, in line with sister circuits[21], endorsed the continuing viability of the procedural approach to so-called "pattern or practice" claims of discrimination derived from the Court's ruling in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Continued adherence to this proof paradigm in class actions seeking money damages requiring trial by jury is directly contrary to decisions in other circuits[22] and this additional mature and highly significant split in authority warrants review and resolution by the Court.

In *Teamsters*, a government-initiated suit decided well prior to the addition of damage claims and jury trials to Title VII, the Court endorsed a bifurcated approach to the bench trial of a pattern or practice claim that has been adopted by the lower

---

21. *See Thiessen v GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001).

22. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *see also Smith v. Texaco, Inc.*, 263 F.3d 394, 415 (5th Cir. 2001), *opinion withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228 (11th Cir. 2000), *cert. denied sub nom Zerei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 121 S. Ct. 1354 (2001); (*Teamsters* paradigm inapplicable in case seeking legal relief); *and see Kramer*, 15 Lab. Law. 415, 475-76 (2000) (*Teamsters* paradigm not automatically applicable in cases involving jury trials and legal relief).

courts in private employment class litigation.[23] During a first "phase" of the litigation (but after a class has been certified), the court determines whether a pattern or practice of discrimination exists. If the court finds that a pattern of discrimination exists, a second "phase" of the litigation ensues (before the court or a special master) to determine whether the defendant is liable to the individual members of the class. Because the plaintiffs established during the first phase of the case that discrimination was "the regular, rather than the unusual practice," class members carry with them from that first phase a presumption that discrimination was a motivating factor in the discrete employment decisions each challenges. Aside from this presumption, the second phase resembles in nearly every respect a single-plaintiff disparate treatment discrimination trial; the employer puts on all the evidence at its disposal to justify its employment decision and the individual plaintiff/class member tries to demonstrate that this explanation is a pretext for discrimination. *See generally McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

The Seventh Amendment's re-examination clause, providing that "no fact tried by a jury shall be otherwise reexamined in any Court of the United States", U.S. Const. Amend. VII, is surely implicated by a trial scheme in which multiple juries are employed to decide whether an employer is liable to any given individual. As Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995), "[t]he right to a jury trial in federal civil cases, conferred by the Seventh Amendment, is a right to have juriable issues determined by the first jury

---

23. This is not to say that the approach in *Teamsters* is applicable in all employment discrimination class actions, as the Court itself observed ("not all class actions will follow [this] model", 431 U.S. at 360). *See also Lockart v. Westinghouse Credit Corp.*, 879 F.2d 43, 57, n.15 (3d Cir. 1989) (district court not required to instruct jury under *Teamsters* paradigm even where plaintiffs allege a pattern or practice of discrimination).

impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact." Appellate courts repeatedly have struck down as violative of the Seventh Amendment trial schemes where one jury is asked to decide generic liability issues and subsequent juries are free to apply or refuse to apply the presumptions created by the first jury to specific individual settings, both within[24] and outside of the employment discrimination setting.[25]

"Liability" is the issue during *both* phases of a class-wide disparate treatment case. Even if the class prevails during Phase I, the employer is not liable to a single individual member of the class until a jury determines that that employee was subjected to discrimination; that determination is not made until the second phase. The primary work of the jury during Phase I, determining whether to create a presumption that each individual employment decision made respecting members of the class was discriminatory, is reexamined and tested, employment decision by employment decision, during Phase II. And because a "pattern" of discrimination is composed entirely of hundreds or thousands of individual employment decisions, aggregated through statistics, the Phase II juries (and there would have to be multiple juries to try any significant number of individual claims) necessarily would be called upon to re-examine and reevaluate the strength of a "pattern" finding made at Phase I. It may well be, for example, that most or even all of the Phase II juries find that the individual determinations upon which the

---

24. *See Smith v. Texaco, Inc.*, 263 F.3d 394, 415 (5th Cir. 2001), *opinion withdrawn*, No. 00-40337, 2002 WL 131415 (5th Cir. Feb. 1, 2002) ("To meet the requirements of the Seventh Amendment, one jury may have to hear all the issues regarding the pattern and practice claim. This same jury would have to determine the quantum of compensatory and punitive damages"); *Allison v. Citgo Petroleum Corp.*, 151 F.3d at 422-25; *and see Hardin v. Caterpillar, Inc.*, 227 F.3d 268 (5th Cir. 2000) (holding that new trial could not be limited to punitive damages alone, but had to encompass liability, compensatory and punitive damages).

25. *See, e.g., Blyden v. Mancusi*, 186 F.3d 252, 268 (2d Cir. 1999); *Castano v. American Tobacco Co.*, 84 F.3d 734, 750-51 (5th Cir. 1996).

alleged pattern is based were non-discriminatory, in which event the prior jury's verdict would not only have been reexamined but rendered a legal nullity. This result cannot be reconciled with the Seventh Amendment.[26]

This constitutional issue cannot be avoided, as the court below suggested, by limiting initial proof to statistical patterns and precluding introduction of evidence relating to individual discrimination claims. *See* Pet. App. A-31 (suggesting that "evidence regarding specific instances of discrimination is relevant during the liability stage . . . [to] provide[s] 'texture' to the statistics" and should not be admitted "to establish that the particular instances of discrimination actually occurred nor that the particular employees were in fact victims of discrimination.") A defendant faced with a pattern or practice claim must be able to rebut the plaintiffs' proof not only with statistical evidence but by proving that identified individuals (often but not necessarily the named plaintiffs) were not in fact the victims of discrimination. *See Teamsters*, 431 U.S. at 360 n.46 ("[w]e do not mean to suggest that there are any particular limits to the type of evidence an employer can use" to rebut proof of an alleged pattern or practice).[27] Numerous courts have recognized that an employer accused of a pattern or practice of discrimination has the right to defend itself by proving that each individual action taken was justified and not the product of discrimination. *See Ardrey v. United Parcel Service*, 798 F.2d 679,

---

26. *See generally* Fentonmiller, *Damages, Jury Trials and the Class Action under the Civil Rights Act of 1991*, 12 Lab. Law. 421, 441-42 (1997) ("it is questionable whether the Teamsters approach of bifurcating liability and damages issues is constitutional now that Title VII affords a right to jury trial and damages.").

27. Indeed, the court below noted earlier in its opinion that at Phase I "the defendant can present anecdotal and other non-statistical evidence tending to rebut the inference of discrimination. The prudent defendant will follow all three routes if possible, presenting its own version of the numbers game, attempting to undermine the plaintiff[s]' version with specific attacks on [the] validity of the plaintiff[s]' statistics, and garnering non-statistical evidentiary support as well." Pet. App. A-13 (quoting Larson, *Employment Discrimination).*

683 (4th Cir. 1986); *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985); *Western Electric Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976) ("[T]o deny [an employer] the right to present a full defense on the issues would violate due process."). Particularly in a case such as this, where the contours of the alleged policy of "overdelegation" are so nebulous, an employer may well wish to prove at Phase I that the alleged "policy" of discrimination itself is illusory by proving that each individual decision was made completely independently of other decisions, or was justified on the merits and not the product of discrimination. Precluding an employer from presenting relevant evidence that it considers essential to its defense in order to avoid Seventh Amendment complications raises due process issues of constitutional dimension.

Wholly apart from such constitutional issues, the procedure hypothesized by the court of appeals — permitting a Phase I "liability" class trial but leaving the "remedies" phase to hundreds, perhaps thousands, of individual lawsuits — can hardly be consistent with the "principal purpose" of Rule 23, which is to promote "efficiency and economy of litigation. . . ." *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 349 (1983). While a Phase I "liability" finding shifts to the employer the burden of proof at Phase II, the subsequent trial proceedings are otherwise indistinguishable from individual, garden-variety disparate treatment cases. Because certification would not obviate the need for these myriad individual trials, the court saves nothing in judicial resources.

But certification means that, in all likelihood, there will never be a Phase I proceeding, much less *seriatim* Phase II trials. Class certification, in virtually every employment discrimination case of any size or scope, means a coerced settlement, even where the plaintiffs' case on the merits is thin or even non-existent. Until the Court considers and resolves these vitally important issues, the current trend of certification and settlement based upon speculation will continue and expand.

II. The Court Should Resolve Whether A Court May Engage In Meaningful Analysis Of Facts Proferred By Plaintiffs At The Class Certification Stage.

The Court has observed that "[a] district court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). "'A plaintiff who brings a class action presents two separate issues for judicial resolution. One is the claim on the merits; the other is the claim that he is entitled to represent a class.' 'The denial of class certification stands as an adjudication of one of the issues litigated.'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 402 (1980).

Because the class decision can be the litigation's most significant, and because that decision "stands as an adjudication of" that issue, the Court has repeatedly required that the parties seeking certification "show" that they have "satisf[ied]" Rule 23's requirements, *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 614 (1997), and has directed district courts to perform a "rigorous analysis" to assure that the threshold mandates are met.[28] The language used by the lower courts to describe this burden varies from case to case; courts variously describe it as the "burden of proof"[29]; a burden of "persuasion"[30]; or courts charge the moving party with "showing,"[31] "establishing,"[32] or "demonstrating"[33] that these requirements are actually met.

---

28. *General Telephone Co. v. Falcon*, 457 U.S. 147, 161 (1982).

29. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 146 (4th Cir. 2001).

30. *Feinstein v. Firestone Tire & Rubber Co.*, 535 F. Supp. 595, 600 (S.D.N.Y. 1982).

31. *Stastny v. Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 276 (4th Cir. 1980).

32. *Johnston v. HBO Film Management, Inc.*, 265 F.3d 178, 194 (3rd Cir. 2001).

33. *Doninger v. Pac. Northwest Bell, Inc.*, 564 F.2d 1304, 1312 (9th Cir. 1977).

Whatever the locution, however, "actual, not presumed, conformance with [Rule 23] remains . . . indispensable."[34]

In reversing the district court's ruling on whether Respondents had met their burden under Rule 23(a), the court below, like the Tenth Circuit in *Thiessen v. GE Capital Corp.*, 255 F.3d 1221 (10th Cir. 2001), *pet. for cert. filed*, 70 USLW 3410 (2001), transformed this burden into one of production alone; if plaintiffs are able to produce evidence suggesting on its face that the requirements of Rule 23(a) have been met, the district court may go no further.[35] The court below forbade the district court from questioning the probative value of Respondents' statistical evidence at the certification stage, concluding that Petitioner's efforts to specify the myriad errors in the proferred statistical evidence involved inappropriate "dueling of experts" that had its place — if at all — only when the merits were contested.

Nothing in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), upon which the court below relied, requires that the district court ignore disputed questions of fact — or to resolve any such disputes in favor of the class plaintiffs — if those disputes are simultaneously relevant to the merits and the class certification question. Four years after *Eisen* was decided, the Court put the decision in its proper perspective:

---

34. *Falcon*, 457 U.S. at 160.

35. The court of appeals initially made this error when the case was before it for the first time. *Caridad v. Metro-North R.R.*, 191 F.3d 283 (2d Cir. 1999). Petitioner sought review at that time, but the Court denied the petition *sub nom. Metro-North R.R. v. Norris*, 529 U.S. 1107 (2000). The prior denial of certiorari does not deprive the Court of discretion to grant review of the entire case, including the issues on which it previously denied certiorari. *See, e.g., Washington v. Washington State Passenger Fishing Vessel Ass'n.*, 443 U.S. 658, 672 n.19 (1979) (denial of certiorari from an interlocutory decision does not foreclose review pursuant to a later petition in the same case), *citing Reece v. Georgia*, 350 U.S. 85, 87 (1955); *see also Scott v. United States*, 436 U.S. 128 (1978).

> [E]valuation of many of the questions entering into determinations of class action questions is intimately involved with the merits of the claims. The typicality of the representative's claims or defenses, the adequacy of the representative, and the presence of common questions of law or fact are obvious examples. [Answers to the questions posed by class certification motions are often] enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 469, 469 n.12 (1978) (citation omitted).

Inevitably, in this sort of case, Rule 23 issues significantly overlap the merits, as numerous other appellate courts have recognized:

> Intertwining of the class action inquiry with the merits inquiry is of course not confined to Title VII actions, but the degree of coincidence is perhaps unique in Title VII cases such as the instant one where there exist critical substantive issues of the very existence and scope of any practice having sufficiently "common" effects on the alleged class. A consequence where this degree of coincidence exists is that fair determination of the propriety of class action may be exceedingly difficult without conducting an inquiry roughly comparable to that required to resolve the "pattern or practice" issue on the merits.

Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 274 (4th Cir. 1980). Thus, at the class certification stage in a pattern or practice case, at least to some degree "the class action and merit inquiries essentially coincide," because determining the class issues "in effect requires answering the substantive question whether . . . there exists the requisite pattern-or-practice

sufficiently and comparably affecting an identifiable class of protected employees." *Id.* at 274. Other circuits agree.[36]

In the Second and Tenth Circuits, however, the route to class certification involves no "rigorous analysis," only a pro forma glance at the plaintiffs' affidavits. Even if those affidavits are implausible on their face and contradicted by compelling evidence, the district court has no option; certification is required. This should not be the law in any circuit. The Court should clarify this recurrent issue and reemphasize that compliance with Rule 23 must be demonstrated, not presumed.

CONCLUSION

For the reasons expressed above, the Chamber respectfully submits that the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
JOSHUA A. ULMAN
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20026
(202) 463-5337

ZACHARY D. FASMAN*
NEAL D. MOLLEN
PATRICK W. SHEA
CARLA R. WALWORTH
PAUL, HASTINGS, JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000

Attorneys for Amicus Curiae

* *Counsel of Record*

---

36. *See also Szabo v. Bridegport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001)

> ("But nothing in . . . Rule 23, or the opinion in Eisen, prevents the district court from looking beneath the surface of a complaint. . . . Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.")

And see Love v. Turlington, 733 F.2d 1562, 1564 (11th Cir. 1984).